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BEFORE THE COMMISSION ON WATER RESOURCE MANAGEMENT

OF THE STATE OF HAWAII

In the Matter of	)	SWUPA-E (NA WAI EHA, MAUI)
	)	NO. 2157
Na Wai Eha Surface Water Use	)	
Permit Application of WAILUKU	)	WAILUKU WATER COMPANY LLC'S
WATER COMPANY LLC	)	OBJECTIONS AND RESPONSE TO
	)	COMMENTS OF STATE OF HAWAII
	)	OFFICE OF HAWAIIAN AFFAIRS
	)	TO SWUPA-E (NA WAI EHA,
	)	MAUI) NO. 2157
	)	

WAILUKU WATER COMPANY LLC'S OBJECTIONS AND RESPONSE  
TO COMMENTS OF STATE OF HAWAII OFFICE OF HAWAIIAN AFFAIRS  
TO SWUPA-E (NA WAI EHA, MAUI) NO. 2157

By letter dated May 26, 2009, the Office of Hawaiian  
Affairs ("OHA") submitted "comments" on the above-referenced  
Surface Water Use Permit Application ("SWUPA") of Wailuku Water

Company, LLC ("Wailuku Water").<sup>1</sup> Wailuku Water objects to the "comment" letter and moves that it be stricken from the record of this matter as OHA is not a party to the proceeding. Subject to and without waiving its objections to OHA's participation in this proceeding, and pursuant to H. Admin. R. § 13-171-18(c), Wailuku Water files and serves this response to the OHA comment letter.

A. Objection To OHA's Participation In Proceeding.

Section 13-171-18 (a), H.Admin.R., states in relevant part: "Within ten working days after the last public notice of the pending permit application, a **party** may file with the commission, written objections to the proposed permit . . . ." (Emphasis added). To file an objection, OHA must be a party to the proceeding, a hurdle which OHA cannot clear.

Party is defined in H.Admin.R. § 13-167-2 (a) as a "person or agency named as a party, or **properly seeking and entitled as of right** to be admitted as a party . . . ." (Emphasis added). Nowhere within the rules that govern water use permits (H.Admin.R. §§ 13-171-11 to 13-171-27) is OHA mentioned. As such, OHA is neither named as a party nor is OHA entitled as of right to be admitted as a party.

Based on a clear reading of this Commission's rules governing water use permits, OHA is not a party to Wailuku

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<sup>1</sup>While the "comment" letter indicated that it was sent to Wailuku Water Co., LLC's address, in fact the letter was sent to another address. The letter was delivered to Wailuku Water Co., LLC's offices on June 1, 2009.

Water's SWUPA. As such, OHA's comments must be rejected and stricken from the record in this matter.

Without waiving its objection to OHA's participation in this proceeding, Wailuku Water submits the following response to OHA's "comment" letter.

B. Objection That Action on SWUPAs Must Not Be Considered Until Amended IIFSs Are Established.

Wailuku Water previously objected to the posted SWUPAs (except its own SWUPA) on the ground that it would be premature for the Commission on Water Resource Management (the "Commission") to process the applications until it has adopted amended interim instream flow standards ("IIFS") for the Na Wai Eha streams. This Commission's rules require that competing existing use applications which in the aggregate exceed the established instream flow standards shall be addressed in "a hearing to determine the quantity of water that may be consumed and the conditions to be imposed on each existing use." H. Admin. R. § 13-171-14(c).<sup>2</sup> Whether this Commission must hold a combined hearing only can be determined after the amended IIFS are established. As such, it is premature for this Commission to act on any of the SWUPAs for the Na Wai Eha surface water

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<sup>2</sup>The section directing the Commission to hold a single hearing on competing existing use applications refers to water being drawn from the same "hydrologically controllable area," which term is not defined in Chapter 171. While the terms "water management area" and "hydrologic unit" are defined, it is unclear whether "hydrologically controllable area" was meant to refer to a "water management area" or a "hydrologic unit."

management area. Further, this Commission would not have the authority to allow a person which does not have a competing water use permit application on file to participate in Wailuku Water's SWUPA.

B. Objection That Wailuku Water Failed to Show It is Impracticable to Reduce Distribution System Losses.

OHA asserts a waste claim in the guise of an objection to a SWUPA. Over 5 years ago, OHA joined in a waste complaint that was brought against Wailuku Water asserting the same claims. That complaint was withdrawn in 2006. As such, OHA chose to not assert the claim and now cannot be allowed to resurrect the claim in the guise of an objection to a SWUPA.

Even if the claim could be resurrected in some fashion in this proceeding, it will be up to the Commission, following the presentation of evidence, to make a determination on reasonable and beneficial use. Wailuku Water has provided significant and uncontroverted information to the Commission and its staff concerning its mitigation measures.

Summarizing only a small portion of the evidence previously provided, Wailuku Water utilizes ditch men who patrol at least 14 hours of each day of each year. One of the purposes of the daily patrol is to examine the ditches and reservoirs to assess their condition so that catastrophic failures are prevented. In addition, three employees are engaged full-time on a daily basis to maintain the distribution system. The maintenance will include stopping all diversions into each of the

major ditches for about one week annually and working on those ditches. As appropriate, ditches and/or reservoirs were lined or were replaced with pipe.

Wailuku Water takes great pride in maintenance it performs on its distribution system and the efforts it has exerted over the years. The record is clear that stream flows fluctuate wildly throughout each day. Despite such fluctuations in flow, and facing challenges ranging from drought to flood conditions, Wailuku Water's record of being a good steward of the resource is clear and uncontroverted. Those persons using Wailuku Water's distribution system are assured of reliable and consistent water supply. Wasting simply does not occur.

C. Objection That Wailuku Water's Claim to Appurtenant Rights Is Without Merit.

Wailuku Water vigorously opposes OHA's assertion that the SWUPA process is the appropriate forum in which appurtenant rights are to be determined. Neither the State Water Code (H. Rev. Stat. Chapter 174C) nor the Hawaii Administrative Rules dealing with water use permits in water management areas (H. Rev. Stat. Chapter 171, Title 13) provide a basis by which the Commission can or should determine whether appurtenant rights exist in the context of a SWUPA.

Section 13-171-1, H.Admin.R., relates that the purpose of the applicable regulations is to establish administrative control over the withdrawal and diversion of surface water in threatened areas to ensure the most beneficial use, development

and management of the water resources. Addressing appurtenant rights, the Commission stated "Nothing in this part shall be construed to deny the exercise of an appurtenant right by the holder thereof at any time." H.Admin.R. § 13-171-27.

These provisions make clear that the Commission did not intend to address, determine or effect any claim of appurtenant rights under the Water Use Permit application process.

This position was confirmed in discussions with the Commission's staff. Before filing its SWUPA, Wailuku Water was advised by Commission staff that appurtenant rights were not the subject of a SWUPA and, as such, any documentation concerning appurtenant rights would be wholly irrelevant to the proceedings and should not be included with any submission.

OHA's objection is an impermissible attempt to expand the scope of these proceedings, invites the Commission to exceed its powers under the SWUPA process, and invites the Commission to commit error. As such, this objection should be overruled.

D. Objection Concerning Reservoir Storage.


The objection concerning the use of reservoirs for storage is without foundation and merit. Wailuku Water uses the reservoirs for a storage function in order to allow water to be delivered on a consistent basis to users. The allegations being made would be more appropriately addressed in a waste complaint but because OHA initiated a waste complaint and dismissed the waste complaint, they are no longer proper. The SWUPA process is

not the appropriate place for this type of complaint. OHA seeks to misdirect the Commission's limited resources and time asserting allegations which are not the proper subject of this proceeding and which OHA asserted and abandoned previously.

E. Conclusion.

Initially, the "comment" letter of OHA should be rejected and stricken from this record because OHA is not a party and has not asked to be a party to this proceeding. Should the Commission consider OHA's comments, they must be rejected for the reasons stated above and should be summarily overruled by the Commission.

DATED: Kahului, Hawai'i, June 5, 2009.

  
PAUL R. MANCINI  
Attorney for  
WAILUKU WATER COMPANY LLC

CERTIFICATE OF SERVICE

I hereby certify that on the date hereof I caused a copy of the foregoing to be duly served by depositing same in the United States mail, postage prepaid, to the following at their last known address:

Clyde W. Namuo  
Administrator  
Office of Hawaiian Affairs  
711 Kapiolani Boulevard, Suite 500  
Honolulu, Hawaii 96813

DATED: Kahului, Hawai'i, June 5, 2008.



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WAILUKU WATER COMPANY LLC